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IN THE

Supreme Court of the United States

OCTOBER, 1945, TERM.

No. [redacted] 152

ROBERT W. BARNES,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF.

PETITION AND BRIEF OF THE PETITIONER.

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BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petition of Robert W. Barnes, by his attorney, Thomas L. Newton, respectfully shows as follows:

Statement.

That your petitioner believes this Court has jurisdiction herein under sec. 237 (b) of the Judicial Code as amended, 28 U. S. C. sec. 344 (b), providing a final judgment in any suit in the highest court of a State in which a right under the United States Constitution has been violated may be reversed by this Court.

That the judgment or order of the Court of Appeals of the State of New York affirming the conviction of your petitioner of the crime of Murder, First Degree, with one Judge dissenting, was rendered March 7, 1946 (People vs.

Barnes, 295 N. Y. 767), and its judgment was made the final judgment of the Supreme Court, Niagara County, State of New York, April 2, 1946 (rec. pp. 651, 653); that the remittitur of the Court of Appeals, through the same was requested in the petitioner's brief and on the argument of his appeal before said Court, did not state that your petitioner raised a Federal Question that his rights under the due process of law clause of the Fourteenth Amendment of the United States Constitution had been violated and necessarily passed on by the Court which decided that his rights thereunder had not been violated; that your petitioner made a motion in the said Court of Appeals returnable May 20th, 1946, to amend its said remittitur, to show that your petitioner raised said Federal Question as requested in his brief and argument, which motion is pending, and a certified copy of its decision thereon was requested to be sent directly to the Clerk of this Court by the Clerk of said Court of Appeals, the same to be made a part of the certified copy of the record on this application for a writ of certiorari.

That the Federal Question involved is the violation of your petitioner's rights under the due process of law clause of the Fourteenth Amendment of the United States Constitution in that his said conviction was obtained upon alleged oral and written admissions and confessions coerced and compelled from your petitioner and this question was raised in the first instance on the trial of the case in Supreme Court, Niagara County, New York, before a Court and Jury, as to the oral admissions and confessions by your petitioner's objection that what your petitioner said confessions were the result of threats, expressed and implied, and such evidence would be admitted in violation of the due process of law clause of the Fourteenth Amendment of the United States Constitution, which objection was overruled

(rec. p. 267), and as to the two alleged written confessions, People's Exhibits 46 and 47, by the same objection, which was overruled (rec. p. 280), and then by your petitioner's motion made at the close of all the evidence to strike from the evidence the two alleged written statements, Exhibits 46 and 47 in evidence (rec. pp. 307-316), claimed to be confessions, upon the ground the statements were taken in violation of the due process of law clause of the Fourteenth Amendment of the United States Constitution and were involuntary as matter of law, and then again by motion for a mistrial on the ground that receiving those statements in evidence was such prejudicial matter as could not be remedied by any instruction of the Court, which motions were denied with exception (rec. pp. 542, 543), and then as to the oral admissions or alleged confessions and the written confessions by your petitioner's motion made immediately after the jury's verdict of guilty for a new trial upon all the exceptions in the case and that the verdict of the jury was contrary to law and clearly against the evidence, which motion was denied with exception (rec. p. 640); that said Federal Question was next raised on appeal in the Appellate Division of the Supreme Court of the State of New York Fourth Department, which on June 27th, 1945, affirmed your petitioner's judgment of conviction, without opinion, with Harris, J., dissenting and voting for a reversal and for granting a new trial, in a memorandum, in part, as follows, " * * * The ruling of the Trial Court and its charge as to a violation of Sec. 165, Code Cr. Proc. was insufficient to advise properly the jury. People v. Malinski, 292 N. Y. 360, reversed 324 U. S. 401. With the above in mind, it cannot be said that the defendant was not prejudiced on his trial. * * *" (People v. Barnes, 229 A. D. 898, rec. p. 649); that said Federal Question was next raised on appeal in the Court of Appeals of the State of

New York, where on March 7th, 1946, your petitioner's judgment of conviction was affirmed without opinion, all concurring except Dye, J., who dissented and voted for a new trial, Madalie, J. deceased (People v. Barnes, 295 N. Y. 767).

That your petitioner was convicted of the crime of murder, first degree, September 29, 1944, in the Supreme Court, Niagara County, State of New York, and then sentenced to life imprisonment pursuant to recommendation of the jury's verdict (rec. pp. 5, 6, 639).

That the question involved is if the admission in evidence of two alleged written confessions in particular was as to the petitioner a denial of due process of law under the Fourteenth Amendment of the United States Constitution.

That the indictment herein was filed Sept. 8, 1944, in Supreme Court, Niagara County, New York, and charged that on Aug. 4, 1944, at the City of Niagara Falls, Niagara County, New York, your petitioner committed the crime of Murder, First Degree, in that he of malice aforethought strangled and killed Miriam Kennedy (rec. p. 6) and petitioner was arraigned thereon the same day and plead not guilty (rec. pp. 3, 4) and charged the same day by Bill of Particulars then filed that at the time Miriam Kennedy was killed your petitioner was engaged in the commission of a felony upon her person, to wit, Rape in the First Degree, and the act took place at 625 Dorothy Street on the early morning of the date alleged (rec. p. 3).

Undisputed Facts.

That your petitioner was arrested at about 5:00 P. M. August 17, 1944, and questioned that evening maybe 45 minutes in the presence of Officers DeBrine, Stephens, Wasley, Wagner and Fitzsimmons and District Attorney Marsh, concerning his movements the night of August 3rd and the morning of August 4th, and got through questioning about 7:00 that evening, and resumed at about 8 o'clock with Officers Fitzsimmons, DeBrine, Stephens, Hageman, Cruickshank, Wasley and Wagner present and they concluded questioning him about 11:00 P. M. when he was placed in a cell. He said he did not know anything about the murder of Miriam Kennedy. The following morning he was questioned about an hour and forty-five minutes in detail concerning his past life with Officers DeBrine, Stephens and Fitzsimmons and District Attorney Marsh present. He was brought before Officer Fitzsimmons about one o'clock and Fitzsimmons told him they were taking him to Buffalo to put him on the lie detector and he said he had no objection (rec. pp. 238-250). Officers Fitzsimmons and DeBrine took Barnes in a car to Buffalo Police Headquarters where they arrived at 2:45 P. M. Officers Fitzsimmons and DeBrine talked with Anthony Schasre, the lie detector operator, for 20 to 25 minutes. Barnes was in the lie detector room with Officer Schasre an hour and 40 or 50 minutes. He was in the room some time while Schasre talked to him before he was put on the machine and questioned by Schasre and then the machine was disconnected and Schasre talked to him for 20 minutes (rec. pp. 251-252). Schasre talked to the petitioner an hour and fifty minutes altogether and he then came out of the lie detector room (rec. p. 253). Schasre returned to the lie detector room and had an argument with Barnes in which Schasre said to Barnes "You are a lying black bastard" and then Chief of Detectives Golembeck left

the lie detector observation room and went into the lie detector room (rec. pp. 255-256) and struck Barnes somewhere in the face and he went down on the floor right near the chair where he was sitting (rec. pp. 336, 337, Officer DeBrine's testimony, who said Schasre called Barnes "a God damn lying nigger bastard, rec. p. 336) and Barnes was told to get up from the floor and take off his trousers and shorts but he made no effort to get up so they were taken off while he was lying on the floor, and then when Barnes did not get up the officers raised him and set him in a chair (rec. pp. 260, 261) and the shorts are People's Exhibit 25 in evidence (rec. p. 261). During all this time Barnes did not admit any participation in the murder (rec. p. 263). Then Officers Fitzsimmons, DeBrine and Fitzgibbons went into the lie detector room and told Barnes to put on his trousers, which he did, and they took him to another room and questioned him for about an hour and Barnes denied all knowledge of the crime and made no change in statements made before (rec. pp. 263, 264). At about 6 o'clock Officers Fitzsimmons and DeBrine left the Buffalo Police Headquarters with the petitioner in a car for Niagara Falls and Barnes was further questioned by the officers in the car and they told Barnes he was lying, that they knew he was lying, that when he claimed he wore 34 shorts he was lying, that when he said he knew nothing about the Kennedy Murder case he was lying, the various questions that he had been asked in the lie-detector room proved he was lying and that they had his prints and after they had passed over the Grand Island Bridge nearest Buffalo and for a short distance on Grand Island and Fitzsimmons and DeBrine were talking as they were going over Grand Island about different cases they had been on and reached the peak of the next bridge and started down toward Buffalo Avenue, Niagara Falls, Fitzsimmons called DeBrine's attention to an electric light pole part way down on the

bridge and said, "That electric light pole marks the spot from which an elderly man was thrown into Niagara River some time ago and there is now a man by the name of Knight who is now in Sing Sing waiting the execution of his sentence. He didn't know how to tell the truth either," and they continued down the bridge 400 feet (rec. pp. 265, 266) in Buffalo Avenue, Niagara Falls, and the defendant asked what sentence will he get and when told it was up to the Judge and Jury then said, "If you will take me to see my wife I will tell you about the Kennedy murder case because I killed Mrs. Kennedy" (rec. pp. 267, 268) and then Officer Zimmerman stated what the petitioner said (rec. pp. 269-274) and thereafter what was said was taken in the written statement, People's Exhibit 46, commencing at 9:17 and ending at 11:19 that evening (rec. pp. 277-279) and signed at 11:22 P. M. August 18, 1944 (rec. p. 280) and he was questioned the next morning by Officers Fitzsimmons and DeBrine till around 11:30 and this was reduced to writing and signed by the petitioner at 8:15 P. M. August 19th and contained matter in addition to People's Exhibit 46, the last statement being People's Exhibit 47 (rec. pp. 288, 289, 307-316).

That the Police Officers prevented your petitioner's personal doctor from seeing him at the Niagara Falls police station though the doctor called at the station at 3 and 4 o'clock P. M. August 20, 1944 (rec. pp. 421, 422).

That Officer Fitzsimmons knew when he took the petitioner into custody that Section 165 of the Code of Criminal Procedure provided "The defendant must be taken before a magistrate without unnecessary delay and he may give bail at any hour of the day or night" and yet he did not arraign your petitioner in the City Court of Niagara Falls

till 3:30 P. M. August 20, 1944, Sunday, a rare exception as to time of holding the Court (rec. pp. 299, 321).

That Officer Fitzsimmons' preliminary examination before admission of People's Exhibits 46 and 47 showed that during the time your petitioner was in custody he was not allowed to see any person till 1:00 A. M. August 19th, which was after he had signed Exhibit 46, and that person was his wife (rec. p. 301), when they took her into custody (rec. p. 322) at his home with an officer present (rec. p. 361) and was not allowed to see anybody else until after the investigation was completed (rec. p. 303).

That the Court of Appeals of the State of New York has decided the said Federal Question in a way probably not in accord with the applicable decisions of this Court, to wit, McNabb v. United States, 318 U. S. 332, Chambers v. Florida, 309 U. S. 227, Aschraft v. Tennessee, 322 U. S. 143 and Malinski v. New York, 324 U. S. 401, cited by your petitioner in his brief before said Court of Appeals of the State of New York.

That the Court of Appeals of the State of New York in affirming petitioner's conviction sustained the trial court over objection and exception and prevented your petitioner from showing he was not allowed to consult his attorney while in custody of the Niagara Falls Police without a Niagara Falls Police Officer being present on the morning of August 21, 1944, when time was of vital importance to your petitioner in protection of his rights under said due process of law clause of the Fourteenth Amendment of the United States Constitution, and in its ruling made the law of the Supreme Court of New York State controlling over the decisions of this Court, which matter

was presented by your petitioner on his brief and argument in the said Court of Appeals on his appeal to said Court (rec. pp. 302, 303).

Wherefore, your petitioner, Robert W. Barnes, prays that a writ of certiorari may issue out of and under the seal of this Court directed to the Court of Appeals of the State of New York, commanding the said Court to certify and send to this Court for review and determination, as provided by law, this cause and a complete transcript of the record of the Court of Appeals of the State of New York affirming the judgment of conviction that it may be reviewed and reversed and that your petitioner may have such other relief as may be just and that if your petitioner's motion in the Court of Appeals of the State of New York to amend its remittitur, now pending, is not decided by that Court within 3 months from March 7, 1946, within which time this petition must be filed with this Court, the petitioner's time to file this petition for a writ of certiorari be extended under sec. 350, Judicial Code, for not to exceed sixty days.

Dated, June 3, 1946.

ROBERT W. BARNES,
Petitioner,
by THOMAS L. NEWTON,
Counsel for Petitioner.

I hereby certify that I have examined the foregoing petition for a writ of certiorari and that in my opinion it is well founded and the cause is one in which the petition should be granted.

THOMAS L. NEWTON,
Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES.

ROBERT W. BARNES,
Petitioner,
against
THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The statement under which jurisdiction of this Court is invoked, the question presented and the undisputed factual matter relevant to this application with authorities believed applicable appear in the petition to which this brief is annexed.

Indictment.

The indictment is based on part of Sec. 1044, Penal Law, State of New York, which provides as follows:

> "The killing of a human being, unless it is excusable or justifiable, is murder in the first degree, when committed: * * * 2. * * *; or without a design to effect death, by a person engaged in the commission of, or an attempt to commit a felony, either upon or affecting the person killed or otherwise; or,—"

Punishment.

Sec. 1045 of the Penal Law provides as follows:

> "Murder in the first degree is punishable by death, unless the jury recommends life imprisonment as provided in section ten hundred forty-five-a."

Sec. 1045-a of the Penal Law provides as follows:

> "A jury finding a person guilty of murder in the first degree, as defined by subdivision two of section ten hundred forty-four may, as part of its verdict, recommend that the defendant be imprisoned for the term of his natural life. Upon such recommendation, the court may sentence the defendant to imprisonment for the term of his natural life."

Under this section the petitioner was sentenced to imprisonment for life (rec. pp. 5, 6, 639).

The jury's recommendation under section 1045-a is not binding on the Court.

People v. Ertel, 283 N. Y. 519.

Bill of Particulars.

The Bill of Particulars when filed became, in effect, a part of the indictment.

People v. Bogdanoff, 254 N. Y. 16.

The Crime.

Miriam Kennedy was a young married white woman, residing with her husband, Alvie J. Kennedy and their three children, James 8 years, Evelyn 4 years and Ronald 2 years, in a ground floor apartment in the Pineacres Federal Temporary Housing Project, on the outskirts of the City of Niagara Falls. The project, built to accommodate 1700 families, was made up of over one hundred two-story sixteen family dwelling units covering a wide area. At the time of the murder only about 100 families lived in the entire project; a group of white families in the neighborhood of the apartment occupied by the Kennedy's at No. 625 Dorothy Street, and a group of colored families on 69th

Street where the defendant resided, about six or seven blocks from the white settlement.

On the morning of August 4, 1944, Mr. Kennedy completed a 13-hour shift at the Bell Aircraft Corporation, about 3 miles from his home; punched out at the time clock at the plant at 5:30 A. M., and immediately started for his home in a friend's car. His 4 year old daughter answered his call to unlock the front door, and when he entered he found his son, James Kennedy, in a highly emotional condition. He went through to the bedroom occupied by his wife and two youngest children and there found his wife lying on the floor dead; her legs spread apart; the lower portion of her night gown up over her private parts; her underpanties around her neck; and marks on and about her throat and neck.

An autopsy on the murdered woman's body showed numerous cuts and laceration about the neck and throat and the cause of death asphyxiation by strangulation. Spermatozoa was present in the vagina (rec. pp. 56, 87, 90).

ARGUMENT.

The petitioner asserts that he has been convicted of the crime of murder and been sentenced to life imprisonment as the result of a trial that deprived him of his rights under the due process of law clause of the Fourteenth Amendment of the United States Constitution.

> "The complaint is not of commission of mere error, but of a wrong so fundamental that it made the whole proceeding a mere process of law."
>
> Brown v. Mississippi, 297 U. S. 278, 286.

POINT I.

The admission in evidence of People's Exhibits 46 and 47 over the petitioner's objection and denial of his motion to strike the same from the evidence made at the case's close, being the alleged confessions of the petitioner, with exception, together with the denial, with exception, of the petitioner's motion for a new trial on the ground the verdict of the jury was contrary to law and against the evidence, constitute a violation of petitioner's rights under the due process of law clause of the Fourteenth Amendment of the United States Constitution (rec. pp. 298, 304, 302, 305, 307-316, 542, 543, 544, 640).

State Statutes and Constitutional Clauses Involved.

"The defendant must in all cases be taken before a magistrate without unnecessary delay, and he may give bail at any hour of the day or night."

Sec. 165, Code of Criminal Procedure.

"Section 1. * * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *"

Amendment XIV, United States Constitution.

"No person shall be deprived of life, liberty or property without due process of law."

Section 6, Art. 1, Constitution of State of New York.

The holding of the United States Supreme Court in Malinski v. New York, 324 U. S. 401, affirming and reversing in part People v. Malinski, 292 N. Y. 360, is as follows:

"The question whether there has been a violation of the due process clause of the Fourteenth Amendment by the introduction of an involuntary confession is one upon which this Court must make an independent determination on the undisputed evidence."

"If all the attendant circumstances indicate that the confession was coerced or compelled, it may not be used to convict a defendant."

"A conviction obtained by use of coerced confession will be set aside even though the evidence apart from the confession might have been sufficient to sustain the verdict."

"The judgment against Malinski, resting in part on a coerced confession, must be reversed. A majority of the Court do not reach the question whether the subsequent confessions were free from the infirmities of the first."

"Sec. 395, Code of Criminal Procedure, provides in part as follows: A confession of a defendant whether —to a private person, can be given in evidence against him, unless made under the influence of fear produced by threats, * * *; but is not sufficient to warrant his conviction without additional proof that the crime charged has been committed."

People's Exhibit 46 is, in substance, a repetition of what the defendant said after Fitzsimmons and DeBrine crossed the Grand Island Bridge into Niagara Falls and People's Exhibit 47, in substance, is the same with statements as to additional crimes (rec. pp. 265-274, 338-342).

IN PART

Defendant's Version of his Arrest, Treatment and Questioning.

The police came to the petitioner's home Saturday night, Aug. 5, after which the appellant went to Police Headquarters at 9:30 A. M. Monday and the police then took his palm prints and head and pubic hair and scraped the dirt from underneath his fingernails. There was no proof of any white epithelium cells or human blood found in these scrapings yet there were on Miriam Kennedy's throat three overlapping fingernail scratches three-eights to one inch in length and three circular lacerations one-half inch long on the left side of her neck (rec. pp. 52, 407, 409, 410).

Her fingernails were scraped underneath after her death and the scrapings therefrom were sent to the laboratory at Albany and returned to the Falls police (Fols. 984, 985). The condition of the deceased's bedroom and the position of her body clearly disclosed she had powerfully resisted her assailant undoubtedly scratching him with her fingernails, yet no proof any brown epithelium cells or human blood or negroid head hair was proven on the trial as evidenced by her fingernail scrapings (rec. pp. 48, 92).

Barnes was taken into custody by the Falls police about 5 o'clock P. M., Aug. 17, 1944. His fingerprints and picture were then taken and he was questioned by the finger-print man. District Attorney Marsh, officers Fitzsimmons, DeBrine and another detective from about 7:30 to 8:30 that evening during which he related in detail his actions and the people with him during the evening of Aug. 4, to noon of August 5, 1944. He was again questioned by them at #2 police station from 9:20 till after 10 during which time he denied knowing anything about the Kennedy murder when Marsh said to him, "It's no use to lie to us because we have the dead evidence on you," and he told them again and again of his actions on the night of the murder. The next morning, Aug. 18th, he was questioned from 30 to 45 minutes by Marsh along the same line as before and Marsh said to him, "You are lying to us, and we know it," and he said, "Well, you ask me for the truth and I told you". In the afternoon he was again questioned by two Falls detectives whom he did not know and again denied killing Mrs. Kennedy and other charges. About an hour later officers DeBrine and Fitzsimmons again questioned the appellant and again he denied killing Mrs. Kennedy or entering her home and answered various questions. Again at about 3 o'clock that afternoon he was questioned by

Fitzsimmons, DeBrine and Marsh and he again asserted he had told the truth and all he knew and DeBrine said, "You are sure you told us all you know," and appellant said, "I sure have," and DeBrine said to Fitzsimmons, "Let's take him to Buffalo," and to defendant "We will put you on the lie-dector, we will tell what you done," and the appellant said O. K. and they left for Buffalo about 10 minutes later (rec. pp. 239, 410, 411, 413-417, 427, 432-442).

Officers DeBrine and Fitzsimmons took him to Buffalo to the lie-detector room at police headquarters. Officers Fitzsimmons and DeBrine were in the room with Buffalo Police Office Schasre, the lie-detector operator, about 30 minutes before they took him therein where he was questioned by Schasre. He was placed on the lie-detector machine twice and each time denied the killing of Mrs. Kennedy and other facts claimed to be material evidence by the police. When Schasre asked him, "Wasn't these your shorts," and he said, "No, they isn't my shorts," whereupon Schasre said, "You are a lying black son-of-a -bitch," and he said "You don't have no right to call me that, those isn't my underwear," and during this statement he had gotten up and walked over toward Schasre and shaking his hand in his face told him, "You don't have any right to call me that," and Schasre said, "Well, you are," and Barnes then said, "Well don't call me no more, because you are wrong" and Schasre broke for the door and then Officer Golombeck, weighing 185 pounds entered and said, "What is wrong," and Schasre said, "Captain, this young negro made a jump for me," and as Barnes told him he didn't and said, "I got up to tell him not to call me another black, lying son-of-a-bitch," and as he was trying to explain Golombeck said, "You are a black, lying son-of-a-bitch" and about that time hit Barnes and not one Buffalo Police Officer took

the stand to deny this evidence though they had been in court. When Golombeck struck Barnes he knocked him on his face on the concrete floor and before he could get up some one kicked him under the arm. He tried to get his head under the table where they could not stomp his head and some one stomped him on the back (substantiated by the evidence of Dr. Hayes) and then Officers Fitzsimmons and DeBrine came and they asked him what was wrong with him and he told them, "You know what it was all about," and Barnes pulled himself up by taking hold of the legs of those officers who "sat" him in a chair (Fols. 1343-1347). They said that when Schasre went out that Barnes bit a hole in the lie-detector hose but he did not have time to bite any hole and it could not be done and was not produced at the trial though Officer DeBrine was challenged to do so while on the stand (rec. 335, 445-448, 336, 453, 421-423, 449, 450, 346, 347).

While Barnes was on the floor they took his clothes off (rec. p. 450).

DeBrine and Fitzsimmons continued to question him together with another officer whom he did not know but who said Mr. Marsh was his boss and who told him, "Why don't you tell me the truth, that I can make it easy with you, Mr. Marsh is my boss, I call him up and tell him you have confessed," and he told him "I ain't going to say nothing because I didn't do it. What is the use of my telling a lie. I know I didn't do it." They then placed him in an auto, DeBrine driving. They kept asking him questions and Fitzsimmons told Barnes "We will get you to a doctor just as quick as you start talking." When they got to the top of Grand Island bridge Fitzsimmons said, "Bob, you remember some crime happened here away back." It was some man thrown off that bridge into Lake Erie. He told him

the man was thrown off the bridge for lying and showed the spot where it was, stopping the auto at the top of the bridge. Barnes told him, "Well, what are you telling me about it for? I haven't done any crime," and Fitzsimmons said, "Well, now, tell us the truth. We will make it light on you," "Well, we will see about getting a light sentence," and Barnes said "Mr. Fitzsimmons, I haven't done any crime you have accused me of." While on the bridge they told Barnes that the man who threw the other man in the river was waiting electrocution. They stopped at the Carborundum plant but did not see appellant's wife. They then asked Barnes if he did it and he said, "No, I didn't" and Fitzsimmons said, "Well, you are going to tell us a better story than that" and they pulled up at the Shredded Wheat plant and DeBrine said, "Bob, if you will tell us the truth, we can help you" and he said "Well, Mr. O'Brian, I didn't do it. What do you want me to do, say I done it," and DeBrine said, "Well, we known you done it, but we want you to tell it from your own mouth," and Barnes said, "Yes I did, I did," and DeBrine said "How did you do it" and he said, "I done it, whatever you ask me." He said, "Well, what did you do," and Barnes said, "Yes, I killed Mrs. Kennedy." They then locked him up in the police station (Fols. 1361-1370). This was about 6 o'clock. They told him the doctor would be there in about twenty minutes. The doctor bandaged his side at No. 2 Police station after 10 o'clock. He felt sleepy. He then was questioned by DeBrine, Fitzsimmons and Marsh at great length (Fols. 1380-1383), whereupon he gave the first written statement (Fols. 1380-1407).

They took Barnes about 8:30 the next morning to police headquarters and DeBrine took hair from his head and privates and then locked him up. This was Saturday. They

did not let appellant smoke. He only remembered signing one written statement on different sheets of paper. He acknowldged his signature as being on the second statement (rec. pp. 452, 455-457, 474-476, 460).

The conversation of Officers Fitzsimmons and DeBrine on the Grand Island Bridge formed the basis for every alleged admission of guilt by defendant and his signing of People's Exhibits 46 and 47, supplemented by the threat, as he understood that if he didn't talk he would be taken back to Buffalo (rec. pp. 473, 474).

Defendant's Objection.

> "Mr. Newton: I object to what was said as the result of threats, express and implied, and to any evidence admitted in violation of the due process of law clause of the State Constitution of New York and the due process of law clause of the 14th Amendment of the United States Constitution, and in violation of the clauses of the respective constitutions compelling the witness to become a witness against himself on a criminal charge.
>
> The Court: Do you wish to cross examine as to what was said?
>
> Mr. Newton: No. I rest on just what he testified to on that objection.
>
> The Court: Objection overruled" (rec. p. 267).

The same objection and ruling was made four times (rec. pp. 280, 298, 304, 305).

The Court in its charge read the part of Sec. 395, Code Cr. Pro. in so far as it pertained to confessions obtained by reason of fear produced by threats (Fol. 1869) and in that connection said: "The burden rests upon the People of the State of New York to establish that the alleged admis-

sions and confessions made by the defendant were voluntarily made upon his part and not produced by threats or fear," therefore, the admissions and confessions were, in effect, limited to those produced by fear in the defendant's mind produced by threats (rec. pp. 623, 624).

The test is not what was actually said or done by the officers but what the defendant believed from what they said and did and by using the word "Bob" there is no denying the fact that by what the officers did and said on the Grand Island Bridge as testified to by Fitzsimmons and DeBrine they left the impression on the already beaten and injured defendant that if he did not admit the killing of Mrs. Kennedy to the officers he would be executed at Sing Sing prison for not telling the truth, therefore, the admissions and confessions obtained as the natural flow therefrom assisted by continual questioning, failure to arraign the defendant when the officers had ample grounds to do so, their not allowing the defendant to see any person without the presence of an officer, all as evidenced by the prosecution's witnesses, rendered the admissions and alleged confessions incompetent as matter of law even under Sec. 395, Code of Criminal Procedure. There was no question of fact on the issue involved for the jury.

In People v. Randazzio, 194 N. Y. 147, the following, pp. 154, 155, is very significant:

> "It will be recalled that the first threat was made the night of the arrest, while they were crossing the bridge over the river, at which it was claimed some one called out that they ought to throw them into the river. It is not claimed that this statement was made by any of the officers, but if made, it came from some unknown person in the crowd that was evidently following along in the trail of the officers having the defendant and Barretta in charge. But it appears that there was a doubt

with reference to such an expression being made by any one, for it distinctly appears by the testimony of one of the officers that it was Barretta who made the cry, stating, 'Throw me in the river.' If it was Barretta who thus cried out, certainly it could not have produced any fear in the defendant with reference to the action of the officers or other persons following them. A question of fact would thus be presented for the jury to determine whether or not there was anything in this transaction that produced such fear as to induce the defendant to confess his guilt; but it appears that no confession was asked of him that night. * * *"

"A threat may be implied, as well as expressed and the fear engendered is alike in each case."

Peo. v. Patano, 239 N. Y. 416, p. 419.

Before People's Exhibits 46 and 47 were received in evidence it had also appeared from the People's witnesses, Officers Fitzsimmons and DeBrine, that Barnes had been in custody from 5 o'clock P. M. August 17, assaulted by a Buffalo officer at Buffalo on the afternoon of August 18, before he was returned to the Falls, and that on his return to the Falls that afternoon he admitted the killing of Mrs. Kennedy, and, after the admission, was not arraigned on any charge until Sunday afternoon August 20, at about 3:30 o'clock, in the City Court at Niagara Falls, a rare exception and when they had an uneducated negro as disclosed from his language as a witness and as well that he had no clear understanding of his arraignment, and, further, from the evidence of Dr. Hayes, which was not contradicted, that the officers prevented him from examining the appellant on the afternoon of August 20, 1944, while in custody. After the close of the evidence the petitioner moved to strike these Exhibits from the evidence and for a mistrial because of their prior reception, which motions were denied with exceptions. This evidence presented no question of fact for the jury and as matter of law ren-

dered the Exhibits incompetent and the denial of the motions presents reversible error (rec. pp. 299, 321, 421, 422, 542, 543).

People v. Alex, 265 N. Y. 192.

In People v. Mummiani, 258 N. Y. 394, pp. 399, 400, the Court says:

> "The police are guilty of oppression and neglect of duty when they willfully detain a prisoner without arraigning him before a magistrate within a reasonable time. (Code Crim. Pro. Sec. 165.) The conclusion is inescapable that they do this for the purpose of subjecting him to an inquisition impossible thereafter. Until arraignment before a magistrate, he is held incommunicado, without the protection that comes from the advice of counsel or the encouragement derived from the presence of family or friends. After arraignment, he has these and other helps to fortitude. In a vast majority of the cases that have come before this Court with a defense that a confession was illegally extorted, perhaps, indeed, in all, the wrong, if there was any, was done before the prisoner was brought to court, and would probably have been prevented had he been brought there without delay. * * *"

In McNabb v. United States, 318 U. S. 332, the Court in considering Federal statutes somewhat similar to Sec. 165, Code Crim. Pro., reversed a judgment of conviction, saying at page 345:

> "* * * For two days they were subjected to unremitting questioning by numerous officers. Benjamin's confession was secured by detaining him unlawfully and questioning him continuously for five or six hours. The McNabbs had to submit to all this without the aid of friends or the benefit of counsel. The record leaves no room for doubt that the questioning of the petitioners took place while they were in custody of the arresting officers and before any order of commitment was made. Plainly, a conviction resting on evidence secured through such a flagrant disregard of the pro-

cedure which Congress has commanded cannot be allowed to stand without making the Courts themselves accomplices in willful disobedience of law. Congress has explicitly forbidden the use of evidence so procured. But to permit such evidence to be made the basis of a conviction in the federal courts would stultify the policy which Congress has enacted into law."

And at p. 340:

"And this Court has, on Constitutional grounds, set aside convictions, both in the federal and state courts, which were based upon confessions 'secured by protracted and repeated questioning of ignorant and untutored persons, in whose minds the power of officers was greatly magnified.' Lisenba v. California, 314 U. S. 219, 239-240, or 'who have been unlawfully held incommunicado without service of friends or counsel,' Ward v. Texas, 316 U. S. 547, 555, and see Brown v. Mississippi, 297 U. S. 278; Chambers v. Florida, 309 U. S. 227; Canty v. Alabama, 309 U. S. 629; White v. Texas, 310 U. S. 550; Lomax v. Texas, 313 U. S. 544; Vernon v. Alabama, 313 U. S. 547."

In Chambers v. Florida, 309 U. S. 227, the Court reversed conviction for murder holding that such convictions obtained in the state courts by use of coerced confessions are void under the due process clause of the Fourteenth Amendment and that the United States Supreme Court is not concluded by the finding of a jury that a confession by one convicted in a state court of murder was voluntary, but determines that question for itself from the evidence, saying at page 240:

* * * "To permit human lives to be forfeited upon confessions thus obtained would make of the constitutional requirement of due process of law a meaningless symbol."

These Exhibits, 46 and 47, were made by the police officials to fit their theory of the crime charged. Note in Ex-

hibit 46 where it says "* * * the guy came over and boxed may jaw (rec. p. 311). They were not true nor his admissions to the effect that he killed Mrs. Kennedy and they were not believed by the jury otherwise they would not have in their verdict recommended to the Court the imposition of a sentence of life imprisonment. Their verdict shows evidence of doubt in view of the dreadful crime charged against the petitioner.

The following quoted from Chambers v. Florida, *supra*, p. 240, is particularly pertinent to the present case:

> "We are not impressed by the argument that law enforcement methods such as those under review are necessary to uphold our laws. The Constitution proscribes such lawless means irrespective of the end. And this argument flouts the basic principle that all people must stand on a equality before the bar of justice in every American court. * * *"

The defendant was taken into custody by the Falls Police at 5 o'clock P. M. August 17, 1944 and from that time never saw a friend or his wife alone or his attorney alone till after 10 o'clock A. M. August 21, 1944 (rec. pp. 238, 896).

> "The uncontradicted evidence—*inter alia*, that Aschraft had been held incommunicado for thirty-six hours, during which time without sleep or rest, he had been interrogated by relays of officers and investigators, showed a situation inherently coercive."
>
> Headnote Aschraft v. Tennessee, 322 U. S. 143.

The petitioner was deprived of private consultation and advice of counsel.

Officer Fitzsimmons had testified that he saw the appellant's counsel at the police station at Niagara Falls about 10 o'clock on the morning of August 21, 1944, and then the record shows the following:

"Q. And I asked you to tell me—told you who I was—

Mr. Marsh: * * * Counsel is now interrogating the witness about 21st of August, * * * And these statements were the 18th and 19th. I object to it, your Honor.

The Court: The only limitation to preliminary questions is confined to whether or not these statements so-called were voluntary.

Mr. Newton: That is it, your Honor, and every question I have asked him has been passed on by the Supreme Court of the United States and on that very basis I ask those questions.

The Court: I am awfully sorry about the Supreme Court of the United States, but this is the Supreme Court of the State of New York.

Mr. Newton: Yes, but they have reversed your State courts just for not—

The Court: I do not care to get into any argument with you. I sustain his objection. You have an exception to it.

Mr. Marsh: May I just make this point? I do not object to this line of cross examination at the proper time, but just at this particular time.

The Court: That is the only basis I am ruling on.

I am not limiting it.

Q. Outside his wife you allowed nobody to see him? A. No, sir.

Q. Until after you had completed the questioning of him as you have related? A. Until after the investigation was completed. (Fols. 904-914.)

The statements had been marked Exhibits Nos. 46 and 47 for identification. (Fols. 837, 891.)

Mr. Marsh: At this time, then, I will offer them in evidence.

Mr. Newton: Then I object on the ground they are incompetent; they are taken in violation of Section 395 of the Code of Criminal Procedure, of the due process of law provision of the State Constitution and the 14th Amendment of the United States Constitution;* * *" (rec. p. 298).

"Mr. Marsh: I renew my offer in evidence.

Mr. Newton: I object on the grounds stated.

The Court: I overrule the objection and say this to the jury * * *."

Then after the witness was asked at the suggestion of the Court as to any force or violence or threats being employed against the defendant, which was objected to as calling for a conclusion and it was for the jury to pass on, and answered, "No, sir, none whatever," the statements were marked in evidence and read to the jury (rec. pp. 299, 304-306).

The petitioner intended to show that when his attorney was at the police station at Niagara Falls on the morning of August 21, 1944, he was not permitted to talk to him without the presence of a police officer.

Under the United States Supreme Court decision, *supra*, the question whether or not the statements of the appellant was limited to the fact that they were secured by reason of fear produced by threat but rather whether or not they were the result of coercion. That question was not to be confined to what only occurred before they were taken but his condition, physically and mentally, shortly thereafter and his treatment as continued before and after their taking by the police officers. The jury was not to receive the matter as a question of fact till the matter was developed in all its phases.

Whether there is other evidence in the record sufficient to sustain the verdict, regardless of the confession, to which objection was made, is immaterial. If the admission of the confession denied a right to the defendants under the Constitution, such an error requires reversal.

Braum v. United States, 168 U. S. 533, 540-42.
Lyons v. Oklahoma, 322 U. S. 596.

"The voluntary or involuntary character of a confession is determined by a conclusion as to whether the accused, at the time he confesses, is in possession of 'mental freedom' to confess or deny a suspected participation in a crime. * * * When conceded facts exist which are irreconcilable with such mental freedom, regardless of the contrary conclusions of the triers of fact, whether judge or jury, this Court cannot avoid responsibility for such injustice by leaving the burden of adjudication solely in other hands."

Lyons v. Oklahoma, 322 U. S. 596.

CONCLUSION.

The record conclusively discloses an invasion of petitioner's rights under the Fourteenth Amendment and this Court should intervene to prevent a clear miscarriage of justice.

The petitioner prays that his petition for a certiorari be granted.

THOMAS L. NEWTON,
Counsel for Petitioner.

APPENDIX "A".

Report of Case in New York Court of Appeals.
295 N. Y. 767.

PEOPLE, *Respondent* v. ROBERT W. BARNES, *Appellant.*

Court of Appeals of New York.
March 7, 1946.

Appeal from Supreme Court, Appellate Division, Fourth Department, 269 App. Div. 898, 57 N. Y. S. 2d 269.

Robert W. Barnes was convicted of murder in the first degree. The bill of particulars stated that at the time charged in the indictment, defendant choked, strangled and killed the victim while engaged in the commission of the crime of rape in the first degree upon her person. The defendant made a confession which he subsequently repudiated and on the trial testified in his own behalf and in addition to repudiating the confession charged all persons engaged in the investigation with acts of excessive brutality, drugging, fraud and sexual depravity. The officers involved denied the charges made by defendant. From the judgment of the Appellate Division, 269 App. Div. 898, 57 N. Y. S. 2d 269, affirming the judgment of conviction, the defendant appeals.

Affirmed.

Thomas L. Newton, of Buffalo (Julian J. Evans of Buffalo, of counsel), for appellant.

John S. Marsh, Dist. Atty., of Lockport, for respondent.

Per Curiam.

Judgment affirmed.

All concur except DYE, J. who dissents and votes to order a new trial.

MEDALIE, J., deceased.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. [redacted] 152

ROBERT W. BARNES,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

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STATUTES.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1313.

ROBERT W. BARNES,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

POINT ONE.

The denial by the Court of Appeals of the State of New York of petitioner's motion to amend its remittitur contravenes the due process of law clause of the Fourteenth Amendment of the United States Constitution.

The petition herein shows that on June 3, 1946, there was pending in the Court of Appeals a motion by him returnable

on May 20, 1946, to amend its remittitur to show that the petitioner raised a Federal Question that his rights under the due process of law clause of the Fourteenth Amendment of the United States Constitution had been violated and had been necessarily passed on and decided by the Court that his rights thereunder had not been violated. This question had been raised in the petitioner's brief in the Court of Appeals and a request therein made that the Court so state in its remittitur should it affirm the judgment of conviction and the same request was made by petitioner's counsel on the argument of the appeal.

On June 13, 1946, the Court of Appeals, by a divided court, denied the petitioner's motion to amend its remittitur and by a *Per Curiam* Memorandum stated it did not consider the constitutional question involved in the admission of the defendant's confession, because under its practice the question was not subject to review in the absence of an exception, and no exception had been taken to the admission of the confessions, citing Pontius v. People, 82 N. Y. 339, 346-347; People v. Cummins, 209 N. Y. 283; People v. Pindar, 210 N. Y. 191. (rec. pp. 657, 658.)

The cases cited by the Court of Appeals are not authority for its holding in the instant case because proper objection was timely made and no exception was necessary until the petitioner's motion to strike out the confessions was made at the close of all the evidence, which motion was made and denied with exception in this case. (rec. pp. 542, 543.)

A confession's admission in evidence is different from the admission of ordinary evidence because the question if the confession was obtained by coercion is, in the first instance, a question of law for the Court, and, when admitted by the

Court, then becomes a question of fact for the jury. After the People's witness, Fitzsimmons, testified on direct examination, over objection, that at no time while he had the defendant in custody prior to his signing both statements was any force or violence or threats whatsoever employed against him, no valid objection was then available to defendant as matter of law because it presented a question of fact and when this evidence, taken with the defendant's evidence, which was corroborated in its essential particulars by the evidence of the People, showed the statements were obtained by coercion, the defendant's motion to strike out the statements presented a question of law for the Court which it could not deny as a matter of discretion. Such motion was made here and denied with exception and was the only way the question could be raised under the practice in New York State. (rec. pp. 542, 543.) When the Court submitted to the jury the question of fact for it to decide if the statements were voluntary (rec. pp. 304, 305, 543, 624) and the jury by its verdict of guilty clearly decided that such statements were voluntary, otherwise the judgment could not be sustained by the evidence, the question was again raised when the defendant immediately moved to set aside the verdict and for a new trial upon all the exception in the case and upon the ground the verdict of the jury was contrary to law and clearly against the evidence, which motion was denied with exception and which could not be denied as a matter of discretion. (rec. p. 640.)

The parts of and the statutes of New York State here involved are as follows:

> Sec. 455, Code of Criminal Procedure. "On the trial of an indictment, exception may be taken by the defendant, to a decision of the court, upon a matter of law, by which his substantial rights are prejudiced and not otherwise, in any of the following cases: * * * 3. In ad-

mitting or rejecting witnesses or testimony, or in deciding any question of law, not a matter of discretion, or in charging the jury upon the law, on the trial of the issue."

Under this section defendant's motions were made and denied with exception. (rec. pp. 542, 543, fols. 1625-1629 inclusive.)

Sec. 465, Code of Criminal Procedure. "The court in which a trial has been had upon an issue of fact has power to grant a new trial, when a verdict has been rendered against the defendant, by which his substantial rights have been prejudiced, upon his application, in the following cases: * * * 6. When the verdict is contrary to law or clearly against the evidence."

Under this section defendant's motion was made and denied with exception. (rec. p. 640, fols. 1918, 1919.)

Sec. 389, Code of Criminal Procedure. "A defendant in a criminal action is presumed to be innocent, until the contrary be proved; and in case of a reasonable doubt whether his guilt is satisfactorily proven, he is entitled to an acquittal."

Under this section defendant's motions were made and denied with exceptions. (rec. pp. 543, 544, fols. 1629, 1630; p. 640.)

After denying defendant's motions made at the close of the case the Court said:

"May I say to the jurors that you are not to be prejudiced in any way against the defendant because I have denied the motions of defendant's Counsel. It simply means that these are questions of fact which I am submitting to you for your determination and not matters of law for my determination." (rec. p. 545.)

The above shows that the trial court did not deny defendant's motions as a matter of discretion and the following from Platner v. Platner, 78 N. Y. 90, p. 101, cited in Pontius v. People, 82 N. Y. 339, p. 347, cited by the Court of Appeals herein (rec. p. 658) show that Court to have been in error in denying petitioner's motion to amend its remittitur:

> "* * * It may be conceded also that when the motion to strike out was made, the defendants had made an end of their evidence as to the Conklin note. The motion to strike out was then made. It was not renewed, nor the matter again noticed. It should have been. 'Evidence admitted either with objection, or properly on an objection, which for any reason should not be considered by the jury or affect the result, is not necessarily stricken out, but may be retained in the discretion of the court, the remedy of the party being to ask for instructions for the jury to disregard it. There was no request to instruct the jury to disregard the evidence, and no exceptions to the charge of the judge in respect to it, and the weight to be given to it;" (see opinion in MS. of Allen, J., in Marks v. Kind, * * * 64 N. Y. 628. * * *"

Accordingly the alleged admissions and confessions of the defendant could not be struck out by the court because they had to be considered by the jury and affected the result but when they, taken in connection with the defendant's testimony, clearly showed that they were obtained by coercion, as in this case, then the defendant's motion to strike them out presented a question of law for the court and it was error to deny defendant's motion with exception and, in view of defendant's proven alibi by two disinterested witnesses (rec. pp. 393-397), his wife (rec. pp. 372-374) and himself (rec. pp. 404, 411-417), the verdict of the jury was contrary to law and clearly against the evidence and these questions were of law and raised by defendant's motions for

his discharge made at the close of the evidence and which were denied with exception (rec. pp. 543, 544) and again on his motion for a new trial upon those grounds which was denied with exception. (rec. p. 640.) This clearly distinguishes the cases of People v. Cummins, 209 N. Y. 283 and People v. Pindar, 210 N. Y. 191 cited by the Court of Appeals in denying the petitioner's motion to amend its remittitur (rec. p. 658) and shows they are not in point and the petitioner made the very motion suggested in the Pindar case to withdraw a juror and ask for a mistrial on account of the admissions of the written confessions which was denied with exception. (rec. p. 543.)

In Conclusion.

The fact the Court of Appeals of the State of New York did not consider the constitutional question involved in the admission of the petitioner's confession is under the record herein a ground alone for granting petitioner's petition for a certiorari herein.

THOMAS L. NEWTON,
Counsel for Petitioner.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER, 1946, TERM.

No. [redacted] 152

ROBERT W. BARNES,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER, 1946, TERM.

No. 1313.

ROBERT W. BARNES,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

Statement.

The petitioner seeks a review of the judgment of the Supreme Court of Niagara County convicting him of the crime of Murder in the First Degree and sentencing him to imprisonment at Attica State Prison for the term of his natural life. Following affirmance of the judgment of conviction by the Appellate Division of the Supreme Court, on appeal to the Court of Appeals, the judgment of conviction was affirmed with one judge dissenting.

The remittitur of the Court of Appeals did not state that the petitioner herein raised a Federal Question, that his rights under the Due Process of Law clause of the 14th Amendment had not been violated and that such question

had been necessarily passed on by the court and the petitioner made a motion in the Court of Appeals returnable May 20, 1946 to amend its remittitur to show that the petitioner had raised said Federal Question. Said motion was decided by the Court of Appeals on June 13, 1946 and the motion was denied on the ground that under the rules of practice the constitutional question involved in the admission of the defendant's confession was not subject to review in the absence of an exception and no exception had been taken to the admission of the confession.

The petitioner contends that the admission in evidence of certain oral and written admissions and confessions of the petitioner was a denial of due process of law under the 14th Amendment.

Outline of Evidence Material to the Questions Presented.

On the morning of August 4, 1944, Alvie J. Kennedy returning from work to his home at 625 Dorothy Street, in the City of Niagara Falls at about 5:45 A. M. (R. 56) found his wife, Miriam Kennedy, lying on the bedroom floor dead, her legs spread apart, her night clothing disarranged and around the upper part of her body, her underpanties around her neck and bruise marks around her throat and neck. An autopsy performed by a pathologist revealed numerous cuts and lacerations about the throat and neck and the finding as to the cause of death was asphyxiation by strangulation (R. 48-49). Spermatozoa were found in the vagina which the pathologist testified could not have been present for more than a few days and in any event less than a week (R. 49). On the trial Mr. Kennedy, the victim's husband, testified that he had last had intercourse with the victim about two weeks before the murder and at that time he used a rubber contraceptive (R. 78).

A pair of men's pants was found near the victim's body which the victim's husband had never seen before (R. 66, 67-93). The window in the bedroom adjoining the victim's, occupied by the Kennedy's son James, age 8, was open and the screen was on the ground, the eyelets holding the screen to the window having been pulled out (R. 71-74, 94).

About a half hour prior to the assault on Mrs. Kennedy, entries by wrenching screens from windows had been made in four or five other homes in the immediate area of the victim's home and a radio had been stolen from the Ashworth apartment next door to the Kennedy's.

James Kennedy, the eight year old son of the victim, identified the petitioner as a man who had come into his room just after he had been awakened by having heard a commotion in his mother's room and who just started to choke him when he heard his father, Mr. Kennedy, returning home at the front door and calling to his mother to come to the front door. James testified that when his father called out upon reaching home the man jumped out his window (R. 139-141, 142, 143).

The morning of the murder a palm print was found on the sill of the window in James Kennedy's bedroom from which the screen had been wrenched and through which James said the intruder in the apartment had escaped (R. 145, 151, 182-184). Subsequently ninety or ninety-five palm prints of persons living in the immediate vicinity of the Kennedy home were taken and included in the group were those of the defendant Barnes, (R. 184-187). Paul D. McCann, Director of the New York State Division of Criminal Identification, testified on the trial that it was his opinion, based upon twenty-two points of similarity of characteristic

pattern that the latent print and the print of the defendant's right palm were made by the same hand (R. 213-229).

Following comparison of the latent print and the print of the petitioner, the petitioner Barnes, a thirty-four year old negro residing a few blocks from the victim's home, was taken into custody August 17th. Captain Robert Fitzsimmons, head of the Detective Bureau of the Niagara Falls Police and Sergeant Harold DeBrine of the Bureau of Criminal Investigation, New York State Police, the two officers in charge of the investigation, testified to all the various conversations and interviews had with the defendant following his being taken into custody by the police and fingerprinted about five P. M. on the afternoon of August 17th and established the voluntary character of the admissions and two written confessions. His first oral admission to Captain Fitzsimmons and Sergeant DeBrine was made on the afternoon of the day following his being taken into custody. He said he got home at fourteen minutes to five the morning of the murder and ten minutes later, after his wife was asleep, got dressed and left the house. He told of going to the victim's home, properly describing its location, entering through the rear door, going through the apartment into the victim's room, or as he described it, the room closest to Niagara Falls, and stepping into her room as she raised up in bed and screamed. He said he struggled with her and knocked her to the floor stunning her. He then told of having intercourse with her and as she started to move round he said he choked her until she didn't move any more. He said he then went into another bedroom and saw a small boy standing in bed. The boy said something about telling his daddy and the defendant just shoved the boy down on the bed when he heard a noise at the front door and vaulted out the boy's window. The narrative of the conversations

between the police officers and the defendant and the events preceding the defendant's admissions, are found at (R. 265-274, 338-342). That same evening after dinner the defendant was questioned by the District Attorney and his statement, very similar to the oral admissions previously made to the police officers was taken down on a typewriter and signed by him (Exhibit 46). Offered in evidence (R. 297). Read in evidence (R. 307-311). The following morning, August 19th, he gave the police the same account of time and events in connection with his arrivals and departures from home and his going to Kennedy's and also told of attempts to enter other homes in the area immediately prior to his entry into the Kennedy home and of taking the radio from the Ashworth home, adjoining Kennedy's, which he dropped in his flight and was later recovered by the police (R. 281-287, 344, 345). His oral statement on the morning of August 19th was taken down on the typewriter and was signed by him that afternoon (Exhibit 47). (Offered in evidence R. 297, read in evidence R. 312-316). On the following day, August 20th, just prior to his arraignment before Police Justice Francis L. Giles, the defendant was taken to the scene of the crime and there reenacted it as he had previously described it in the presence of the police officials (R. 293-296, 345). On the trial the defendant, testifying in his own behalf, repudiated the confessions and charged all persons engaged in the investigation with acts of excessive brutality, drugging, fraud and sexual depravity. Captain Fitzsimmons, Sergeant De Brine and Dr. Daniel F. Patchin were called as rebuttal witnesses for the people and denied the charges of the defendant.

Jurisdiction.

The jurisdiction of this court is invoked by petitioner under Sec. 237 (b) of the Judicial Code as Amended, 28 U. S. C. A. Sec. 344 (b).

It is the contention of the respondent that jurisdiction is totally lacking; that the order of the Court of Appeals affirming the judgment of the Supreme Court, did not decide the Federal Question of whether the petitioner's rights under the due process of law clause of the 14th amendment had been violated, for the reason that, as stated in the Memorandum of the Court of Appeals handed down in connection with its denial of petitioner's motion to amend the remittitur to show that a federal question had been passed on, "The question was not subject to review in the absence of an exception and no exception had been taken to the admission of the confession". The court requested by petitioner's counsel on motion to state that it had reviewed a Constitutional Question and had decided that the petitioner's rights had not been violated, specifically stated in its Memorandum that for the reasons above it did not consider the Constitutional Question involved in the admission of the defendant's confession. Respondent further submits that Barnes' admissions and confessions were lawfully received in evidence and that the question of whether they were or were not lawfully obtained was submitted to the jury under proper instructions of the trial court and that therefore there was no denial of due process.

ARGUMENT.

Point I.

The federal question presented by petitioner on this application not having been properly presented to the New York Court of Appeals and not having been decided by that court it is not properly subject to review by this court. To give the court jurisdiction it must appear affirmatively not only that the federal question was presented for decision

but that it was actually decided by the highest court of the state.

As stated in Hartford Life Insurance Co. vs. Johnson, 249 U. S. 490, "The jurisdiction of this court to review the final judgment or decree of the highest court of a state, in such a case as we have here, is defined in Sec. 237 of the Judicial Code as amended September 6, 1916, c. 448, 39 Stat. 726 which provides that it shall be competent for the court by certiorari to require any such cause to be certified to it for review when there is claimed in it any title, right, privilege or immunity under the Constitution of the United States and 'the decision is either in favor of or against the title, right, privilege or immunity especially set up or claimed by either party under such Constitution'. It is the settled law that this provision means 'that the claim must be asserted at the proper time and in the proper manner by pleadings, motion or other appropriate action under the state system of pleading and practice * * * and upon the question whether or not such a claim has been so asserted, the decision of the state court is binding upon this court, where it is clear, as it is in this case, that such decision is not rendered in a spirit of evasion for the purpose of defaulting the claim of federal right' ".

Citing Atlantic Coast Line R. Co. versus Mims, 242 U. S. 532, 535, Gaquet versus LaPeyre, 242 U. S. 367.

Following the judgment of the Court of Appeals of the State of New York affirming the coviction of petitioner rendered March 7, 1946, petitioner made a motion in the Court of Appeals to amend its remittitur to show that petitioner raised a federal question as requested in his brief and argument. The Court of Appeals on June 13, 1946 denied the motion and filed the following memorandum:

The People of the State of New York, Respondent
versus
Robert W. Barnes, Appellant
Decided June 13, 1946
Motion to Amend Remittitur
Per Curiam

We do not consider the constitutional question involved in the admission of the defendant's confession, because under our rules of practice the question was not subject to review in the absence of an exception, and no exception had been taken to the admission of the confession.

(Pontius versus People of the State of New York, 82 N. Y. 339, 346-347; People vs. Cummins, 209 N. Y. 283; People vs. Pindar, 210 N. Y. 191.)

The statute removing the necessity for an exception in such a case does not become effective until September 1, 1946 (Laws of 1946, Chap. 209).

The motion should be denied.

Loughran, Chief Judge, Lewis, Conway, Thacher and Fuld, J. J., concur; Desmond, J., votes to grant the motion; Dye, J., taking no part.

Motion denied.

The memorandum of the court quoted above in the instant case reiterates the well established law of the state as held in the cases cited, that the Court of Appeals will consider in other than capital cases only questions of law raised by exceptions taken on the trial and where no exceptions are taken in connection with rulings on the admissibility of evidence, the remedy of the party is to ask for instructions to the jury to disregard such evidence. In the case at bar no exceptions were taken to the court's ruling on the admissibility of the admissions and confessions and no exceptions were taken to the charge with ref-

erence to their being received in evidence and considerd by the jury. In that situation the Federal Question urged by petitioner's counsel could not be and was not properly presented to or passed upon by the Court of Appeals and this court is without jurisdiction to review the judgment sought to be reviewed herein.

Point II.

There were no violations of petitioner's constitutional rights upon the trial, the defendant's statements and confessions were properly received in evidence by the court to whose ruling on their admission no exceptions were taken by petitioner's counsel, the court properly instructed the jury as to the law applicable to their consideration of them, and the evidence entirely justified a finding by the jury that they were given voluntarily and without coercion.

Captain Fitzsimmons and Sergeant DeBrine testified to the oral admissions made to them by the petitioner while in custody in which he narrated in complete detail his participation in the crime, and the officials also testified to the written confessions (Exs. 46, 47) received on the trial. Fitzsimmons and DeBrine, who were in charge of the investigation and who were present at all times when the petitioner was questioned after being taken into custody, narrated in detail all the circumstances preceding and attending the taking of the statements.

Petitioner was taken into custody by the police and fingerprinted about 5:00 P. M., on the afternoon of August 17. He was questioned shortly after being taken into custody for about three-quarters of an hour concerning his movements on the night previous to and the morning of the murder, without mention being made of the murder, and claimed to have been out most of the night before and at home from

4:45 A. M., on (R. 239-245, 333). Later the same evening, from about 8:00 P. M., to 11:00 P. M., the petitioner was again questioned and, for the first time, specifically about the murder, and he reiterated his previous statement as to his movements and denied any knowledge of the murder, or even having heard about it until the 6th day of August, the day after its occurrence. He claimed that he didn't wear Cooper Jockey shorts and that his size was 34 (R. 245-249, 333). The following morning about 9:30 he was questioned by the District Attorney for about one and one-half (1½) hours, and continued to deny his guilt (R. 249, 250, 333).

That afternoon he was taken to Buffalo Police Headquarters where he was put on the lie detector and questioned by the operator, a Buffalo police officer. During the time that he was in the room in which the lie detector test was given, and while he was alone and he thought unobserved, he attempted to damage the apparatus by biting a tube. Upon being confronted with the charge that he had damaged the machine, he rushed the police officer that had accused him, and an officer, coming to the first officer's aid, struck the petitioner (R. 251-262, 334-337). Before being taken back to Niagara Falls, he was questioned further concerning the crime, confronted with the identical similarity in size and style of his own shorts and the shorts found at the scene of the crime, and he continued to deny any knowledge of it (R. 262-265, 337, 338).

On the way back to Niagara Falls the petitioner was questioned further by Fitzsimmons and DeBrine, but continued to deny any guilt until they had reached the City and had crossed the Grand Island Bridge. Just previously, Captain Fitzsimmons had pointed out a place where a murder victim had been thrown from the bridge, and said that the murderer, who had lied, was awaiting execution for the mur-

der (R. 265-268, 338, 339). The petitioner shortly thereafter asked about the sentence he would get, and when told it would be up to a Judge and Jury said if they would take him to see his wife he would tell about the Kennedy murder, because he killed Mrs. Kennedy (R. 266-268, 339). They drove to the petitioner's home and his wife wasn't there, but on the way back to headquarters the petitioner narrated orally the details of the crime. The petitioner, after being at headquarters for about twenty minutes, was taken to No. 2 Station where he was examined by a doctor and then after being taken to supper in a public restaurant was questioned by the District Attorney in the presence of the police officers and Dr. Patchin, who had examined the petitioner, and his statement was then taken down on a typewriter and signed by the petitioner after having read it over aloud. The circumstances surrounding the taking of the statement (Ex. 46) were testified to by Captain Fitzsimmons (R. 275-280), Sergeant DeBrine (R. 343-345), and Dr. Daniel F. Patchin (R. 356-361).

The following morning he was further questioned and a typewritten statement taken and he, for the first time, admitted the shorts at the scene were his (R. 281, 345).

He also gave a detailed account of his attempts to enter two other homes in the neighborhood on the same morning; and of his entry into the Raybon home and the Ashworth home where he stole the radio. The petitioner was questioned at considerable length concerning a murder of similar character to the Kennedy murder which had occurred at the Pineacres Project several months before the Kennedy murder, as appears in the testimony of the defendant given on the trial, but he steadfastly denied any responsibility therefor.

The following day, August 20th, he was taken to the scene of the crime where he reenacted it as he had previously de-

scribed it, and was then arraigned before Police Justice Giles (R. 293-297, 345, 346).

The court before allowing the testimony of the oral admissions, permitted petitioner's counsel an opportunity to cross-examine the witness, which counsel rejected (R. 266, 267). Petitioner's counsel's objection to the receipt of the admissions was overruled with no exceptions taken, and then before allowing the witness to proceed, the court admonished the Jury as follows:

> "Perhaps I ought to say to the Jury that in admitting this evidence, the court does not indicate that the court takes cognizance of it or believes it. I believe that it is proper evidence to be presented to you to be determined by you as to its character and truthfulness."
>
> Mr. Newton: "And whether it is voluntary."
>
> The Court: "Oh yes." (R. 267).

Following the offering in evidence of the two confessions (Exs. 46, 47), and the preliminary cross-examination by petitioner's counsel (R. 297-304), the court received the Exhibits in evidence, overruling petitioner's objection to which ruling no exception was taken (R. 304, 305) and properly advised the Jury as to the significance to be given their introduction, as follows:

> "I over-rule the objection and say to the Jury, as I said before, so far as the admissions and confessions are concerned, when the court allows them in evidence, it does not signify that the court believes that they are voluntary confessions because those things are questions for the Jury to determine. In the event that these confessions or admissions are not voluntarily and freely given, then they must be disregarded by the Jury. The fact that they are introduced in evidence is simply so that they may be presented to you to determine that question." (R. 304, 305).

THE PETITIONER'S TESTIMONY.

The petitioner testifying in his own behalf, told a story in narrative form, in which he charged those engaged in the investigation with excessive brutality, repeated threats, frauds, the use of vile language, various acts of sexual depravity, and the use of drugs to overcome his normal mental processes. He claims that after being questioned at headquarters when he was first picked up, the District Attorney said,

> "Don't worry with this black bastard. Take him down to No. 2." (R. 433, 434).

While at No. 2 Sergeant DeBrine attempted to slap him (R. 436); the next afternoon at Buffalo Police Headquarters, while on the lie detector, he claimed he was knocked down, kicked and stomped on after an argument over whether the shorts found at the scene of the crime were his, in the course of which two officers called him "a lying black son of a bitch" (R. 448, 449). Following this, they (the Buffalo police officers, Fitzsimmons and DeBrine) removed all the clothes he had on (R. 450), took his private and squeezed it (R. 450, 451). They had already taken his shorts in Niagara Falls (R. 451). A man, claiming the District Attorney was his boss, said he could make it easy for him if he confessed (R. 452), and failing to get a confession on that basis, said, "Take him out to his wife's house and let him have intercourse with his wife. His balls is hot. Maybe he will talk then" (R. 452). He "wouldn't let the officers go out and watch him do something like that" (R. 453). He still denied his guilt and any knowledge of the crime so they started back to Niagara Falls. At the top of the Grand Island Bridge Captain Fitzsimmons and Sergeant DeBrine parked the car and DeBrine pointed out a spot on the bridge where a man got thrown off for lying. They told him a

man was thrown off the bridge for lying and if he didn't tell the truth they would bring him back there (R. 455). In the next breath he said they told him the man that threw him in the river was awaiting his execution (R. 455). DeBrine told him if he told the truth they would make it light on him. Fitzsimmons said they would see about getting a light sentence (R. 455). He didn't want to go out to his house to see his wife but the officers insisted on taking him. His wife wasn't there and she wasn't at The Carborundum working. Finally at The Shredded Wheat plant DeBrine stopped the car and said, "Bob, if you tell us the truth we can help you. We are the men who can help you." He said, "Well, Mr. DeBrine, I didn't do it. What do you want me to do, say I done it." DeBrine said, "We know you done it, but we want you to tell it from your mouth." So with that, he said, "Yes, I did it. I did. I done it whatever you asked me. Yes I killed Mrs. Kennedy" (R. 457). They got back to headquarters about six and he was given a bottle of medicine which he had to drink in front of Captain Fitzsimmons. DeBrine gave him a pill at seven, another at eight and one at ten. Then a doctor bandaged him up. About ten-thirty Fitzsimmons gave him another pill (R. 458, 459). Then he was taken to the second floor where he saw a lady who operated a typewriter, the doctor and seven or eight detectives, including Fitzsimmons, DeBrine and the District Attorney. He couldn't hold his eyes open, was yawning and fell asleep in the corner. They started to question him (R. 460). He went to sleep and they shook him and woke him up. He never felt like that before. He denied attacking the lady, claiming he didn't go in any house; said he didn't know anything about the crime or who was in the house, or how many rooms there were. He said he never went near Mrs. Kennedy. DeBrine then said, "Let's take him back to Buffalo and then we will get him

worked over" (R. 460-462). The District Attorney continued to question him until he finally told him he would tell him anything he wanted to hear. However, when he was asked how he killed Mrs. Kennedy he said he didn't know, and when asked if he threw the victim on the floor he denied it. He continued to deny the whole crime. When asked by the District Attorney what was wrong with him, he said he was sleepy. Finally he couldn't answer half the questions so they let him go to sleep (R. 463-465). After twenty or thirty minutes DeBrine woke him up and the District Attorney questioned some more. He continued to deny any knowledge of the crime and went to sleep (R. 466-468). The District Attorney woke him up and asked him to sign some papers. He signed one and the District Attorney kept slipping papers in front of him. When he asked how many there were, the District Attorney said it wasn't anything to hurt him. He signed six papers but didn't read them (R. 468, 469). While the signatures on Ex. 46 dated August 18th, and Ex. 47 dated August 19th, were both his, he only signed on one occasion, and that was the stack of six papers on the night of the 18th at No. 2 Station (R. 474, 475). On Sunday morning, the second day after he had signed the statement, DeBrine told him they were going to take him out to Pineacres among the people from Georgia and Alabama, and Fitzsimmons showed him a gun which he said was the kind they had out there. DeBrine said, "Take the black bastard out there and turn him loose." He continued to deny his guilt. They took him out to Pineacres, and when they arrived DeBrine pulled a gun on him and told him, "We want no more lying here, we want the truth" (R. 480). He continued to deny any knowledge of the crime, and after making him put his palm print on the window sill, the District Attorney said, "We ought to kick him out the window" (R. 480). After he was taken

back to headquarters, he was taken before the Police Judge, and the Police Judge told him his trial would be set for September 18th (R. 488). The Judge had him sign a paper but didn't ask him any questions (R. 488).

The above resumè of the petitioner's testimony is given in detail because no words of description could adequately suffice to bring out all of its significance and implications. Either it could be taken as proof of a complete lack of ethics and morals and any sense of common human decency and honor on the part of numerous police officers, the District Attorney of Niagara County, and a foremost medical practitioner in the City of Niagara Falls, or it could be taken as a true reflection of the workings and machinations of a mind completely corrupt and steeped in moral depravity and degeneracy. Without attempting to point out its obvious contradictions and improvisations, the story was in direct conflict with the testimony, direct and rebuttal, of the officers in charge of the investigation, who were with the petitioner on all occasions referred to in his testimony, and was also in direct conflict with the testimony of Dr. Patchin, who was present during the entire time the petitioner was questioned at No. 2 Station when he made his first confession.

It is also significant that petitioner's testimony that he steadfastly maintained his innocence and refused to admit any knowledge of the crime or guilt to the District Attorney when his statement (Ex. 46) was taken down at No. 2 Station on the evening of August 18th but merely signed the statement because of his dazed condition is at odds with petitioner's counsel's contention that petitioner admitted the crime but did so because of fear induced by threats.

All the many factual issues relative to the voluntary character of the admissions and confessions were properly referred to the Jury by the Court, under a full and complete

charge as to the law to which no exceptions were taken by defendant's counsel. Was an unprovoked and brutal assault committed on the petitioner by police officers in Buffalo, followed by acts of sexual depravity? Was the petitioner later subjected to repeated threats and acts of violence by police officers and the District Attorney during the time that he was being questioned in the City of Niagara Falls, was he drugged and while in a state of mental stupor tricked into signing the two confessions, the contents of which were unknown to him, or were the confessions freely and voluntarily made, not induced by threats or fear or stipulations of immunity?

There is nothing in the record in connection with the testimony of the People's witnesses to substantiate petitioner's contention that the admissions and confession should have been as a matter of law held not voluntary. So far as the blow struck the defendant in Buffalo is concerned, it would reasonably appear from the testimony of the People's witnesses that Chief of Detectives Golumbeck acted properly in coming to the aid of a fellow officer under all the circumstances testified to, The point of major significance in our inquiry here moreover is the relationship of the incident to the later admissions and confessions received in evidence. It appeared that further questioning at Buffalo following the incident and the confronting of the petitioner with the identical features of the shorts he was wearing and the shorts picked up at the scene of the crime, brought no change in his denials of guilt (R. 262-265, 337, 338), and his subsequent admissions in Niagara Falls were unaccompanied by any threats and were never retracted during the time he was in custody and questioned by the District Attorney and others (R. 535-540). It would appear that the petitioner's first oral admissions made to the officers were prompted by

his dread realization that his guilt of the horrible crime was known to the authorities by reason of print and clothing identification, and that his repeated lies would not avail him in his defense any more than did the lies of the other murderer referred to on the bridge by the police officers. The whole question of the possible effect on the petitioner of the episode in the lie detector room presented a question which was fairly and properly referred to the Jury with the specific admonition of the Court that,

> "If the circumstances were such that it inspired a fear in defendant's mind so that his confessions in Niagara Falls were not voluntary then such confessions must be disregarded." (R. 625.)

Dr. Patchin testified to examining the petitioner at about 8:15 P. M., on the evening of August 18th at No. 2 Station, just after his return from Buffalo and just prior to his making his first written confession. He told of bandaging the petitioner's ribs with adhesive tape, and that the only evidence of injury, other than the defendant's own statement that his side hurt, was a mouse over the left eye (R. 362). The doctor testified that no pills were given the petitioner until after he had seen him the next afternoon, when the petitioner still complained of pain. He said he then ordered some empirin tablets and citrate of magnesia for him. He had the petitioner X-rayed on Sunday. The prints showed no bone pathology (R. 355), and he removed the tape Monday morning. He testified that the edema or swelling on the petitioner's side was caused by the ingredients of the adhesive tape (R. 527).

The petitioner's counsel asserts that the delay in arraigning the petitioner from five o'clock August 17th to four o'clock August 20th, renders the admissions and confession of the petitioner made during that time incompetent.

He also complains that the petitioner was arraigned on the 20th, which was a Sunday, rather than presumably the following day, which was a regular Court day.

The law of the State in its application of the provisions of Section 165 of the Code of Criminal Procedure to the admissibility of confessions, has been clearly set forth in a number of leading cases. As stated in the opinion of Judge Pound in People vs. Trybus, 219 N. Y. 18 and quoted with approval by Judge Lehman in People vs. Alex, 265 N. Y. 192:

> "* * * In determining whether a confession has been obtained as a result of a beating or is voluntary, the circumstance that it was obtained while arraignment was illegally delayed, for no apparent reason except that the police needed a confession in order to have competent proof of the commission of a crime, should be considered by the Jury."

and in People vs. Mummiani, 258 N. Y. 394,

> "Disregard of the duty of arraignment does not avail however without more to invalidate an intermediate confession. It is only a circumstance to be weighed with others in determining whether a confession has testimonial value."

The Trial Judge properly charged the Jury as to the effect of the delay in arraignment after quoting the provisions of Section 165 Code of Criminal Procedure, stating that:

> "It is a circumstance and a definite element to be taken into consideration by you in determining whether or not the admissions and confessions were voluntary and freely made without being under the influence of fear."

The zeal of our State Courts and the Federal Courts as well, in their somewhat narrower field of scrutiny in carefully reviewing evidence of coercive tactics on the part

of law enforcement agencies in order to protect the constitutional rights of defendants and to eliminate involuntary confessions has been repeatedly demonstrated and the principles of law affecting the admission of confessions, well settled. The application of the law to each particular case, however, must necessarily depend upon the facts peculiar to that case and respondent submits that the facts of the case at bar clearly distinguishes it from Malinski vs. New York, 324 U. S. 401 and the other decisions of this court cited by petitioner in his brief in support of his contention that petitioner's admissions and confessions were coerced. The records afford no basis for a finding of denial of due process as it is so well defined in Lisinba vs. California, 314 U. S. 219, 236,

> "As applied to a criminal trial denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevent a fair trial."

In the case at bar the reasonableness and effect of the delay in arraignment and the conduct of the police generally were no doubt considered by the jury in the light of all the circumstances attending the confessions taken while the defendant was in custody. The petitioner's first admissions made within twenty-four hours of his being taken into custody, obviously represented to the police but a partial admission of the whole truth. At no time was the petitioner subjected to continual questioning over long periods of time involving interruptions of normal hours of sleep or regular meals. The morning after the first confession, he was questioned about and admitted the other entries on the project and that the shorts found at the scene of the crime were his. That afternoon he was questioned concern-

ing a murder similar in detail and location to the Kennedy murder, and which he denied. The following day he was taken to the scene of the crime in an effort to satisfy doubts as to some of the details narrated, and immediately thereafter arraigned. That he was arraigned on the 20th, a Sunday, rather than the following day simply reflects the attitude on the part of the authorities that there should be no unnecessary delay. The Jury, on the question of coercive tactics by the police to secure a confession, no doubt considered the fact that the petitioner's wife came to see him on the second night he was in custody and talked with him in his cell, that he was taken out to see her at his request the following afternoon, both visits being prior to his signing the second confession, and subsequent to his being taken to the lie detector, that she and no one else were ever denied admittance to see him prior to arraignment, that Dr. Patchin, having no connection with the Police Department, saw him twice during the same time and was present when the first confession was made, that he was taken out to eat in public restaurants, and that on the day after the first confession and before arraignment, newspaper photographers were allowed to see him and take his picture (R. 304, 305). Certainly on the basis of the believable evidence, there is nothing in the conduct of the police that would indicate any attempt on their part to conceal him from view or to deny him conversation with others, and the People submit that the attitude and conduct of the authorities throughout was fair and reasonable and proper in the light of all the surrounding circumstances in the case, and offered no grounds for vitiating the confession.

Also the fact that arraignment was not had until the third day after the petitioner was taken into custody should not reasonably affect retroactively the voluntary character of statements, oral and written, taken the first day after petitioner was taken into custody.

On all the phases of sharply conflicting evidence in the case as to the voluntary character of the confessions, issues of fact were raised which were left to the jury, in a fair, full and complete charge by the Trial Court as to the law to which no exceptions were taken by petitioner's counsel. The practice of the Trial Court in receiving the evidence and in submitting it to the jury was in accord with the well established law of this state as reviewed by the Court of Appeals in People vs. Doran, 246 N. Y. 419 and consistently followed since.

In the conduct of the prosecution, every effort was made to avoid appeals to sympathy, emotion or prejudice which might improperly influence the fair and impartial determination of the issues by the Jury. Conceding that a case as brutal and shocking to the senses as the case at bar requires extra care and caution on the part of the prosecution and on the part of the court to assure a fair and just trial, it is submitted by the respondent that the petitioner's rights were properly and adequately safeguarded, that he received a fair trial, that the verdict of the Jury was amply supported by the overwhelming evidence in the case and that there were no errors on the trial which would affect his Constitutional rights.

Point III.

The petition should be denied.

Respectfully submitted,

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